Supreme Court, U.S.
FILED
MAR 5 2001
CLERK

(2)

00-8942

No. _____

The Supreme Court of the United States
October 2000 Term

On Petition for Writ of Certiorari
to the Court of Criminal Appeals of Texas

Bridgers, Allen,
petitioner

v.

The State of Texas,
respondent

Motion for Leave to Proceed *in Forma Pauperis*

Kenneth Nash
329 S. Fannin Av.
Tyler, TX 75702
903/849-6673
Attorney for Petitioner

57 pp

1. Pursuant to Supreme Court Rule 39, the petitioner, Allen Bridgers, moves the Court to grant him leave to proceed *in forma pauperis* for the purpose of filing a petition for writ of certiorari attached hereto.

2. The petitioner seeks the Court's certiorari review of his capital murder conviction and death sentence.

3. The Court of Criminal Appeals of Texas has affirmed his conviction and sentence upon direct appeal.

4. The petitioner has not previously sought leave to proceed *in forma pauperis;* however, the United States District Court for the Eastern District of Texas has appointed counsel to represent the petitioner in connection with a petition for writ of habeas corpus yet to be filed. See 28 U.S.C., Sec. 2254.

5. Counsel has been appointed pursuant to Title 28, U.S.C., Sec. 2261. A true and correct copy of the order appointing counsel is attached hereto.

6. Because counsel has been appointed, Rule 39.1 dispenses with the requirement of an affidavit or unsworn declaration of indigency.

7. Wherefore, the petitioner prays that the Court grant his motion for leave to proceed *in forma pauperis* in connection with a petition to the Court for writ of certiorari to the Court of Criminal Appeals of Texas

Respectfully submitted,

Kenneth Nash
Texas Bar No. 14811030
329 S. Fannin Av.
Tyler, TX 75702
Telephone 903/849-6673
Telecopier 907/597-0017
Attorney for Petitioner

Certificate of Service

I certify that, on March 5, 2001, I hand delivered three copies of the foregoing *Motion for Leave to Proceed in Forma Pauperi*) (with attached *Petition for Writ of Certiorari*) to an employee of the office of counsel of record:

Mr. Edward Marty, Assistant
Criminal District Attorney
100 N. Broadway Av., Suite 403
Tyler, TX 75702
Telephone 903/535-0520

Kenneth Nash

Kenneth Nash

EOD NOV 15 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FILED-CLERK
U.S. DISTRICT COURT
00 NOV 13 PM 3:13
TX EASTERN-BEAUMONT
BY

ALLEN BRIDGERS, §

Petitioner, §

vs. § Civil Action No. 1:00cv724

GARY JOHNSON, Director, §
Texas Department of Criminal Justice,
Institutional Division, §

Respondent.

ORDER

This matter comes before the Court on Petitioner Allen Bridgers'("Bridgers") motion for appointment of counsel, filed on October 26, 2000. The Court, having considered the motion, finds that it is well taken and it will be granted.

IT IS THEREFORE ORDERED that Kenneth Nash, Esq., 19968 FM Rd 3079, Chandler, Texas (903) 849-6673, is appointed to represent Bridgers in this case.

The rate of compensation for representation will be $125.00 per hour. Interim payment is authorized subject to approval of vouchers submitted for payment. Counsel will not be compensated for time spent on this case before the Texas Court of Criminal Appeals issues a decision on Bridgers' direct appeal.

SIGNED this 13th day of November, 2000.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

2

CJA 30 DEATH PENALTY PROCEEDINGS: APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

1. CIR./DIST./DIV. CODE	2. PERSON REPR*	VOUCHER NUMBER
TXE	Bridgers, Allen	

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
	1:00-000774-001		

7. IN CASE/MATTER OF (Case Name)	8. TYPE PERSON REPRESENTED	9. REPRESENTATION TYPE
Allen Bridgers v. Gary Johnson		Capital Habeas Corpus

10. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) If more than one offense, list up to five major offenses charged, according to severity of offense.

11. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS

NASH, KENNETH
19968 FM 3039
CHANDLER TX 75758

Telephone Number: _____

12. COURT ORDER

☒ O Appointing Counsel ☐ C Co-Counsel
☐ F Subs For Federal Defender ☐ R Subs For Retained Attorney
☐ P Subs For Panel Attorney ☐ Y Standby Counsel

Prior Attorney's Name: _____

Appointment Date: _____

(A) Because the above-named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 11, who has been determined to possess the specific qualifications required by law, is appointed to represent this person in this case.

(B) The attorney named in Item 11 is appointed to serve as: ☐ LEAD COUNSEL ☐ CO-COUNSEL

Name of Co-Counsel or Lead Counsel: _____

Appointment Date: _____

(C) If you represented the defendant or petitioner in any prior proceeding related to this matter, attach to your initial claim a listing of those proceedings and describe your role in each (e.g., lead counsel or co-counsel).

☐ (D) Due to the expected length of this case, and the anticipated hardship on counsel in undertaking representation fulltime for such a period without compensation, interim payments of compensation and expenses are approved pursuant to the attached [illegible]

Richard A. Schaffer
Signature of Presiding Judicial Officer or By Order of the Court

11-22-00
Date of Order

11-13-00
Nunc Pro Tunc Date

(E) Repayment or partial repayment ordered from the person represented for this service at time of appointment. ☐ YES ☐ NO

13. NAME AND MAILING ADDRESS OF LAW FIRM (only provide per instructions)

14. STAGE OF PROCEEDING

Check the box which corresponds to the stage of the proceeding during which the work claimed at Item 15 was performed even if the work is intended to be used in connection with a later stage of the proceeding. CHECK NO MORE THAN ONE BOX. Submit a separate voucher for each stage of the proceeding.

CAPITAL PROSECUTION

a. ☐ Pre-Trial
b. ☐ Trial
c. ☐ Sentencing
d. ☐ Other Post Trial
e. ☐ Appeal
f. ☐ Petition for the U.S. Supreme Court Writ of Certiorari

HABEAS CORPUS

g. ☐ Habeas Petition
h. ☐ Evidentiary Hearing
i. ☐ Dispositive Motions
j. ☐ Appeal
k. ☐ Petition for the U.S. Supreme Court Writ of Certiorari

OTHER PROCEEDING

l. ☐ Stay of Execution
m. ☐ Appeal of Denial of Stay
n. ☐ Petition for Writ of Certiorari to the U.S. Supreme Court Regarding Denial of Stay
o. ☐ Other

HOURS AND AMOUNTS CLAIMED

15. CATEGORIES (Attach itemization of services with dates)	HOURS CLAIMED	TOTAL AMOUNT CLAIMED	MATH/TECH ADJUSTED HOURS	MATH/TECH ADJUSTED AMOUNT	ADDITIONAL REVIEW
a. In-Court Hearings (Rate per Hour = $)				IN COURT TOTAL (Category a)	IN COURT TOTAL (Category a)
b. Interviews and Conferences with Client					
c. Witness Interviews					
d. Consultation with Investigators and Experts					
e. Obtaining and Reviewing the Court Record					
f. Obtaining and Reviewing Documents and Evidence				OUT OF COURT TOTAL (Categories b - j)	OUT OF COURT TOTAL (Categories b - j)
g. Consulting with Expert Counsel					
h. Legal Research and Writing					
i. Travel					
j. Other (Specify on additional sheets)					
Totals: Categories b thru j (Rate per hour = $)					
16. Travel Expenses (lodging, parking, meals, mileage, etc.)					
17. Other Expenses (other than expert, transcripts, etc.)					
GRAND TOTALS					

18. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE	19. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION	20. CASE DISPOSITION
FROM _____ TO _____		

21. CLAIM STATUS ☐ Final Payment ☐ Interim Payment Number _____ ☐ Supplemental Payment

Have you previously applied to the court for compensation and/or reimbursement for this case? ☐ YES ☐ NO If yes, were you paid? ☐ YES ☐ NO

Other than from the court, have you, or to your knowledge has anyone else, received payment (compensation or anything or value) from any other source in connection with this representation? ☐ YES ☐ NO If yes, give details on additional sheets.

I swear or affirm the truth or correctness of the above statements.

Signature of Attorney: _____ Date: _____

COURT ASSESSMENT (COURT USE ONLY)

22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSES	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED

27. SIGNATURE OF THE PRESIDING JUDICIAL OFFICER	DATE	27a. JUDGE CODE

BEST AVAILABLE COPY

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Questions for Review

1. Capital case: Was the petitioner seized within the meaning of the Fourth Amendment when he was handcuffed?

2. Capital case: Were the requirements of *Miranda v. Arizona* satisfied by advising the petitioner that he had the right to the presence of an attorney *prior* to any interrogation only?

3. Capital case: Did the Fourteenth Amendment require the trial court to inform the jury that the petitioner would be ineligible for parole on a life sentence for forty years?

4. Capital case: Did the Eighth Amendment require the trial court to inform the jury that the petitioner would be ineligible for parole on a life sentence for forty years?

Table of Contents

	page
Questions for Review	2
Table of Contents	3
Table of Cited Authorities	4-5
Statement of Jurisdiction	6
Statement of the Case	6-7
Question No. 1	7
Argument	7-9
Question No. 2	9
Argument	9-11
Question No. 3	11
Argument	11-20
Question No. 4	20
Argument	21-25
Prayer	25
Certificate of Service	26
Appendix	27

Table of Cited Authorities

	page
Cases	
Brown v. Texas, 522 U.S. 940, 118 S.Ct. 355, 139 L.Ed.2d 276 (1997)	17,18
California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690, 696 (1991)	8
California v. Prysock, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981)	10
Dickerson v. United States, ___ U.S. ___, 120 S.Ct. 2326 (2000)	9
Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)	15
Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)	25
Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959)	8
Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)	14
Lowenfeld v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988)	23
McCleskey v. Kemp, 481 U.S. 279, 197 S.Ct. 1756, 95 L.Ed.2d 262 (1987)	23
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	9
Penry v. Lynaugh [492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)	24
Ramdass v. Angelone, ___ U.S. ___, 120 S.Ct. 2113 (2000)	18,19
Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994)	23
Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)	14,15 21
Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)	15
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	7,8
United State v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)	8
Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed.2d 793 (1910)	21
Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)	23
Constitution	
Fourth Amendment	7
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.	
Fifth Amendment	9
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.	
Eighth Amendment	21
Excessive bail shall not be required, nor excessive fines, imposed, nor cruel and unusual punishments inflicted.	
Fourteenth Amendment	15
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.	
Statutes	
Texas Code of Criminal Procedure, Art. 37.07, Sec. 4(a)	13
Texas Code of Criminal Procedure, Art. 37.071, Sec. 2	22
Title 28, U.S.C., Sec. 1257	6
Title 28, U.S.C., Sec. 2254(d)	19
United States Sentencing Commission, *Guidelines Manual*, Sec. 1A3 (Nov. 1998)	17
Rules	
Supreme Court Rule 10	20

Statement of Jurisdiction

On October 25, 2000, the Court of Criminal Appeals of Texas affirmed the petitioner's capital-murder conviction and death sentence in an unpublished opinion. See *Appendix*. Thereafter, on December 6, 2000, the court denied the petitioner's motion for rehearing. See *Appendix*. The petitioner believes that Title 28, U.S.C., Sec. 1257 confers jurisdiction upon the Court to review on writ of certiorari the judgment of the Court of Criminal Appeals of Texas in this case.

Statement of the Case

On May 28, 1997, the Fort Lauderdale (Florida) Police Department received information from a confidential informant regarding the location of a possible Texas murder suspect. A detective and seven other law enforcement officers proceeded to a local municipal park where they encountered the petitioner. *R/R, v. 25, pp. 11-12.* Some of the officers were wearing vests displaying "police" and were plainly visible to the petitioner. *R/R, v. 25, pp. 22-23.* After locating the petitioner, he was frisked for weapons. The lead detective advised the petitioner that he was conducting an investigation and requested the petitioner to accompany him to the Fort Lauderdale Police Department. According to the detective, the petitioner replied: "Okay. That's fine. Let's go." *R/R, v. 25, pp. 13-14.* The petitioner was handcuffed and transported to police headquarters. *R/R, v. 25, p. 29.* According to the lead detective it was patently obvious to everyone that he was a police officer as he

was openly displaying his badge, weapon and handcuffs. *R/R, v. 25, pp. 14-15.* At police headquarters, detectives recieved a facsimile transmission of a Texas arrest warrant. *R/R, v. 25, pp. 26-27.* Two other detectives interviewed the petitioner at police headquarters. *R/R, v. 25, pp. 39.* As a result of the interview, they obtained an audiotaped confession. *R/R, v. 25, pp. 45-47.*

At the conclusion of the hearing the trial court denied the petitioner's motion to suppress. *R/R, v. 25, p. 117; C/R, v.3, p. 311.* During the trial the State of Texas offered the petitioner's confession. *R/R, v. 27, pp. 18-20.* The trial court found that the petitioner was not under arrest when he was handcuffed and transported to the the police station. *R/R, v. 25, pp. 118-119; C/R, v. 3, pp. 311-312.* The Court of Criminal Appeals of Texas affirmed, holding that although the petitioner was handcuffed on the way to the police station, he would have felt free to leave; therefore, he was not under arrest as he voluntarily agreed to accompany the officers to the police station. Slip op., at 6-7. See *Appendix*.

Question No. 1

Was the petitioner seized within the meaning of the Fourth Amendment when he was handcuffed?

Argument

The Fourth Amendment protects a person against an unreasonable seizure of his person. *Terry v. Ohio*, 392 U.S. 1, 8, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968). "The word

'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement[.]" *California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 1550, 113 L.Ed.2d 690, 696 (1991).[1] While a "seizure" does not have to culminate in a trip to the station house and prosecution for crime, as here--"'arrests' in the traditional terminology," *Terry v. Ohio*, 392 U.S., at 16, 88 S.Ct., at 1877, a person is "seized" if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave, *United State v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), that is, a police officer's words and actions would have conveyed to a reasonable person that his movement was restricted, *California v. Hodari D.*, 499 U.S., at 628, 111 S.Ct., at 1551. An arrest requires either physical force or submission to authority. *California v. Hodari D.*, 499 U.S., at 626, 111

[1]The Court stated:

> We have long understood that the Fourth's Amendment's protection against "unreasonable ... seizures" includes seizure of the person, see *Henry v. United States*, 361 U.S. 98, 100, 80 S.Ct. 168, 170, 4 L.Ed.2d 134 (1959). From the time of the founding to the present, the word "seizure" has meant a "taking possession," 2 N. Webster, An American Dictionary of the English Language 67 (1828); 2 J. Bouvier, A Law Dictionary 510 (6th ed. 1856); Webster's Third New International Dictionary 2057 (1981). For most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control. ... To constitute an arrest, however--the quintessential "seizure of the person" under our Fourth Amendment jurisprudence--the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient." *California v. Hodari D.*, 499 U.S., at 624, 111 S.Ct., at 1549-1550.

S.Ct., at 1551.

It is ludicrous to suggest that a reasonable man surrounded by law enforcement officers with police insignia, guns and handcuffs would believe that he is free to leave. It is ludicrous to suggest that a reasonable man shackled in handcuffs and hauled to the station house in a police car would believe that he is free to leave.

Question No. 2

Were the requirements of *Miranda v. Arizona* satisfied by advising the petitioner that he had the right to the presence of an attorney *prior* to any interrogation only?

Argument

The Fifth Amendment shields a person from compulsory self-incrimination. In order to ensure that a person (subjected to custodial interrogation) is aware of this right, he must be advised of the right to remain silent and the right to the presence of an attorney (either retained or appointed), and he must be warned that anything said may be used against him in court. *Miranda v. Arizona*, 384 U.S. 436, 444-445, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). Last Term the Court confirmed that these warnings are constitutionally required in order to protect a criminal suspect's Fifth Amendment right against self-incrimination. See *Dickerson v. United States*, ___ U.S. ___, 120 S.Ct. 2326 (2000). Here, the petitioner was not advised of his right to have an attorney present before *and during* any interrogation. The detective merely advised the petitioner that

"you have the right to the presence of an attorney/lawyer *prior* to any questioning." Slip op., at 8. Relying principally upon *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981), the Texas Court of Criminal Appeals held that the warning actually given was the effective equivalent of the warning set forth in *Miranda v. Arizona;* therefore, there was no Fifth Amendment violation when the trial court admitted the petitioner's confession and the evidence derived therefrom. Slip op., at 11-12. The court's reliance upon *California v. Prysock* is mis-placed.

In *California v. Prysock*, a police sergeant warned a juvenile suspect:

> You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning.

The Court held that the warning (actually given) satisfied the requirements of *Miranda v. Arizona*. The Court made clear that the warnings need not track verbatim the language in *Miranda*, as long as they are the fully effective equivalent of *Miranda*. *California v. Prysock*, 453 U.S., at 359-362, 101 S.Ct, at 2809-2810.

Warning the petitioner that he had the right to the presence of attorney prior to questioning only is a far cry from a fully effective equivalent of the warning set forth in *Miranda*. In effect, the Fort Lauderdale police restricted the petitioner's Fifth Amendment right to counsel to access only before questioning but not during. Once the interrogation began, his

lawyer would have to leave the room.

Question No. 3

Did the Fourteenth Amendment require the trial court to inform jury that the petitioner would be ineligible for parole on a life sentence for forty years?

Argument

Prior to trial the petitioner timely challenged Texas law preventing an instruction to the jury that "life imprisonment" guarantees at least forty years of incarceration. The trial court overruled the petitioner's challenge. *C/R, v. 1, p. 149; R/R, v. 4, pp. 20, 24.* Before the trial court charged the jury on the law regarding punishment, the petitioner objected to the court's proposed charge for its failure to instruct the jury on the law regarding parole. The petitioner submitted a proposed instruction. *R/R, v. 34, p. 173; C/R, v. 3, pp. 342-343.* The trial court overruled the petitioner's objection and denied his request. *R/R, v. 34, p. 176.* At the hearing on the petitioner's motion, the trial judge expressed grave reservation in a statutory scheme that sends a jury off to deliberate on life-or-death issues with no clue as to what constitutes a life sentence.[2]

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[2]The trial court remarked:

> Now, however, with respect to the Simmons issue, now, when this issue first came out, my opinion was to let the jury know. The cases following my opinion, as brought to me obviously, by the State, saying, "Judge, you were wrong. Defense wanted this, but you were wrong, Judge," and I said, "Fine, I have a court now telling me not to inform the jury of the effect -- possible effect of a life sentence," now I have four

At the conclusion of the punishment phase, the prosecutor argued to the jury that the petitioner posed too great a risk to society if sentenced to life imprisonment as he would be released on parole soon:

> ... Well, Ladies and Gentlemen, we see clearly that in 1992, July 7th, sentenced to three years for the credit card fraud, sentenced to four-and-a-half years for the burglary of Mr. Rowlette, and sentenced to six years on Shelby Burdette Howard's burglary.
>
> That kind of brings us up to a more recent date, because now we have February 5th of 1996. That's when the [the petitioner] is paroled out of the Georgia penitentiary and is put on the streets.
>
> Well, that leads us, Ladies and Gentlemen to his parole, basically another opportunity when he's out on the streets, and we find out in the State's exhibits ... that [the petitioner] was paroled by Georgia on February 5th of 1996, ... It would have been just a little while ago but for the new capital murder

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judges on the United States Supreme Court -- four, not five -- four that say, "We have a problem with this."

This is not a decision. This is a memo that just says that "Texas beware," and that's what that memo says. My normal philosophy is that if the courts tell me that's what it is, that's the way that it is.

Death is different. Death is different. And in a capital case, that if a death penalty is assessed, as a result of endless -- almost endless appeals and review, I think that this [c]ourt is well cautioned by the United States Supreme Court to make an independent determination and reevaluation of whether or not a request by the Defendant to have submitted to the jury an instruction as to what life means under the current Texas statute is a reasonable request.

*****

This memorandum--and I read it very carefully--makes awful good sense. It talks about truth in the jury charge, and I never see a downside to letting juries know the truth.

*****

But I'm worried about what the United States Supreme Court is going to do, and I think in an abundance of fairness, I need to think about giving it. ... This motion is denied. *R/R, v. 4, pp. 22-24.*

offense. *R/R, v. 35, pp. 10-11.*

From his argument the prosecutor implied: If you (the jury) sentence the petitioner to life, he would be out in a couple years and victimize someone else "if predators like [the petitioner] are allowed to run around in our society." *R/R, v. 35, p. 61, lines 18-19.* The prosecutor proceeded to argue that the petitioner was "probably going to be a future danger wherever he goes." *R/R, v. 35, p. 54, lines 22-23.* The petitioner desperately needed a parole instruction to overcome this mis-impression to the jury. The trial judge denied the petitioner's requested parole instruction. Because the *Brown* "memorandum" had no precedential value, the trial judge deferred to the State's "legislative directive" and opinions of the Texas Court of Criminal Appeals that state law does not require and does not envision that a parole instruction be given in a capital murder case. *R/R, v. 34, pp. 175-176.* Having found no constitutional problem in keeping the jury in the dark as to the forty-year mandatory minimum, the trial court accordingly omitted any reference to the mandatory minimum incarceration period from the jury charge. As a result, the petitioner's due process rights under the Fourteenth Amendment were violated.[3] The Texas Court of Criminal Appeals affirmed the trial court's decision to reject a parole instruction. Slip op., at 18-20.

The analysis should start with acknowledgment of the

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[3]The Texas Code of Criminal Procedure, Article 37.07, Section 4(a) provides for instructions on parole "unless the defendant has been convicted of a capital felony[.]"

obvious: The public, from which jurors are drawn, fears the release of violent criminals from prison. The Court recognized in *Keeble v. United States*, 412 U.S. 205, 212-213, 93 S.Ct. 1993, 1998, 36 L.Ed.2d 844 (1973), that a juror's fear of a dangerous person walking the streets may overcome her sense of duty to apply the abstract law without regard to anticipated consequences. The same type of latent fear lies at the heart of the problem presented here. Perhaps nothing frightens the public more than the possibility that a man committed to prison for a heinous murder will reappear on the streets, courtesy of a misguided parole policy, and resume his vicious behavior. Prospective jurors are bombarded with nightly news reports of yet another violent felon released from prison only to victimize another poor soul. From these news accounts, the public develops the notion that there is a "swinging door" at the front of the prison whereby these violent felons are released on parole almost as soon as the reach the penitentiary.

In *Simmons v. South Carolina*, a plurality of the Court held that

> where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. *Simmons v. South Carolina*, 512 U.S. 154, 156, 114 S.Ct. 2187, 2190, 129 L.Ed.2d 133 (1994).

Counsel for South Carolina argued, *inter alia*, that it did not matter whether the jurors were kept in the dark since the trial judge did instruct them that the possibility of parole should not be considered. The plurality held that this was a rare instance

in which it was most likely that a jury would *not* follow a trial court's instruction, given the virtual certainty that jurors would wonder about parole. *Simmons v. South Carolina*, 512 U.S., at 171, 114 S.Ct., at 2197.

The next step is to recognize what the Court did and did not decide. A total of seven justices held, in various opinions in *Simmons*, that the due process clause of the Fourteenth Amendment was violated by keeping the jury ignorant of the fact that Simmons would be ineligible for parole on a life sentence. The plurality built on earlier decisions in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), which had established that due process forbade assessment of the death penalty "on the basis of information which [the defendant] had no opportunity to deny or explain." *Simmons*, 512 U.S., at 164, 114 S.Ct., at 2194, quoting from *Gardner*, 430 U.S., at 362, 97 S.Ct., at 1207. Strictly speaking, it would be more accurate to characterize the situation in *Simmons* (and here) as jurors lacking *correct* information, but semantics are not important here. What is important is to recognize that jurors are likely to have thoughts about parole, if not actual information, whether or not a trial court correctly instructs them.

The plurality stated: "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant." *Simmons*, 512 U.S., at 163, 114 S.Ct., at 2194. Presumably the plurality would have used a phrase like

"complete ineligibility" if it intended to limit *Simmons* to only situations in which a capital defendant is completely ineligible for parole on a life sentence. The petitioner believes that the plurality opinion, by referring to "actual duration" of a sentence, intended to explicate a rule which would apply to *all* situations where the genuine length of incarceration on a life sentence might seem like a viable alternative to the death penalty. The petitioner contends that the jury should have been informed of the length of guaranteed incarceration which was *legally* certain, that is forty years. The "actual duration" in this context can only mean that which is *legally* certain. Nothing in *Simmons* states that actual "life without parole" is a *sine qua non* for making such information relevant.

Thus the difference between Texas law and the law in *Simmons* is more apparent than real. Obviously "future dangerousness" is a *sine qua non* for assessment of the death penalty in Texas. In South Carolina "life" imprisonment for a capital-murder defendant literally means a full natural life. In that state a capital murderer serving a life sentence never becomes eligible for parole. In Texas, at the time of the petitioner's offense, a chunk of forty calendar years was carved out of a capital inmate's life, and he would merely be eligible for parole at the end of that time. Eligibility, of course, does not guarantee release, just consideration.

The petitioner was twenty-six years old at the time of his arrest. Assuming full credit for jail time served during pre-

trial detention, the earliest he could become eligible for parole consideration, if sentenced to life, is the year 2037, when he is sixty-seven years old. If a jury guided by proper information, rather than mis-information and fear, is a component of due process in a capital case, then the petitioner's jury should have been given the chance to decide his fate on the basis of correct information. There is a substantial likelihood that at least some members of the jury would have found guaranteed incarceration until age sixty-seven to be persuasive as to the future-dangerousness issue. Recently criminal justice groups have undertaken several efforts at so-called "truth *in* sentencing." Congressional approval of the federal sentencing guidelines immediately comes to mind.[4] Is it too much to ask that capital sentencing juries be told the truth *before* sentencing?

Finally, the petitioner notes that there are some members of the Court who perceive a "tension" between *Simmons* and the Texas practice. A couple terms ago, they remarked that the Texas rule keeps jurors in the dark when they make vital future-dangerousness assessments. *Brown v. Texas*, 522 U.S. 940, 118 S.Ct. 355, 139 L.Ed.2d 276 (1997) (Stevens, J., concurring on

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[4]See, *e.g.*, United States Sentencing Commission, *Guidelines Manual*, Sec. 1A3 (Nov. 1998):

> ...[The basic objective of the Sentencing Reform Act of 1984] was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system...

denial of certiorari). They characterized this situation as "especially troubling." *Id.*, 522 U.S., at 940, 118 S.Ct., at 356.

> [T]he Texas Legislature recognized that, without a parole instruction, noncapital jurors may not fully understand the range of sentencing options available to them. Perversely, however, in capital cases, Texas law *prohibits* the judge from letting the jury know when the defendant will become eligible for parole if he is not sentenced to death. The Texas rule unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose.[5] *Id.*

That certainly indicates that the issue is "constitutional" enough to warrant review. Justice Stevens' opinion actively encouraged the lower federal courts to address this issue as an aid to the Court when it inevitably must address the issue.

> [T]he likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.' [Footnote omitted.] *Id.*, at 357.

In rejecting the petitioner's claim, the Texas Court of Criminal Appeals relied upon *Ramdass v. Angelone*, ___ U.S. ___, 120 S.Ct. 2113 (2000). Slip op, at 19. Last Term, a plurality

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[5]Justice Stevens has, of course, touched upon the true reason for keeping jurors in the dark: Uninformed jurors are predisposed to vote the death penalty. As discussed in footnote 2 of his opinion, polling data reveals that informed jurors are less likely to return death verdicts as mandatory minimums increase. Of course, the only way to arrive at that result is to correctly inform them of the parole laws. Hardcore death-penalty advocates resist.

Justice Stevens intimated that *Simmons* might also require admitting evidence showing that parolable life-sentence murderers are almost never paroled before the age of 70 and that the recidivism rate for elderly prisoners after lengthy incarceration is 'negligible.'" *Brown v. Texas*, ___ U.S., at ___, 118 S.Ct., at 355.

of the Court held that "*Simmons* applies only to instances when, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Ramdass v. Angelone*, ___ U.S., at ___, 120 S.Ct., at 2121. This decision is distinguishable. As Justice O'Connor explained, the case came before the Court on *habeas corpus* review; therefore, the Court was bound by the stricter standard of review set forth in Title 28 U.S.C, Sec. 2254(d).[6]

> [Title 28 U.S.C., Sec. 2254(d)(1)] forbids relief unless the state-court adjudication of a federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." ... [A] state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts. The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to the context in which the principle should have controlled. *Ramdass v. Angelone*, ___ U.S., ___, 120, S.Ct., at 2119-2120.

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[6]Title 28, U.S.C., Sec. 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Here, the petitioner brings his question on petition for a writ of certiorari from a judgment of a state court (following a direct appeal). In that regard the Court applies a looser standard for review set forth in Supreme Court Rule 10.[7]

Question No. 4

Did the Eighth Amendment require the trial court to inform the jury that the petitioner would be ineligible for parole on a life sentence for forty years?

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[7]Supreme Court Rule 10 states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (1) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted an usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settle by this Court, or has decided an important federal question in a way that conflicts with relevant decision s of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Argument

Long ago the Court observed in *Weems v. United States*, 217 U.S. 349, 378, 30 S.Ct. 544, 553, 54 L.Ed.2d 793 (1910), that the Eighth Amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." Until the Texas Legislature finally authorized a parole instruction in capital cases, a truly enlightened public opinion never made its way to a jury panel which ultimately decided the life-or-death question of punishment, since juries were kept in the dark as to the practical ramifications of a life sentence under Texas law. This practice invited rank speculation as to the most important decision made in the capital trial, risking arbitrary, ill-informed, and inconsistent results, in violation of the Eighth Amendment.[8]

The core language of the Eighth Amendment prohibits cruel and unusual punishment. As suggested by *Weems, supra*, Eighth Amendment jurisprudence takes into account "evolving standards of decency." Thus, a comparison to other states is appropriate. Footnote 8 in *Simmons* [512 U.S., at 168, 114 S.Ct., at 2196], noted only four states other than Texas where the courts do not instruct on parole, and one of those states, North Carolina, has changed through recent legislation. The plurality in *Simmons*

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[8]The Texas Court of Criminal Appeals summarily rejected the petitioner's Eighth Amendment challenge to the trial court's failure to instruct the jury regarding his parole eligibility. Slip op., at 19-20. The court cited *Simmons v. South Carolina* and *Ramdass v. Angelone*. Neither case, however, has applied Eighth Amendment jurisprudence to the petitioner's claim.

specifically declined to reach the issue of an Eighth Amendment violation, but as demonstrated by the concurring opinion of Justice Souter, the Eighth Amendment provides an alternative basis for concluding that a correct instruction on parole ineligibility is necessary. *Simmons*, 512 U.S., at 172-173, 114 S.Ct., at 2198.

There is now a firmly-rooted principle in Eighth Amendment jurisprudence that a heightened degree of procedural reliability is needed in death-penalty cases, so that it safely can be said that only those deserving of the death penalty receive it instead of receiving some lesser punishment. *Simmons*, 512 U.S., at 172, 114 S.Ct., at 2198 (Souter, J., concurring). Keeping jurors ignorant of the actual law regarding parole eligibility only invites juries to make arbitrary and capricious sentencing decisions, because ungrounded fears about the reappearance of a dangerous man in their community to resume his life of crime overcome their careful deliberations over the death penalty issues set forth in Texas Code of Criminal Procedure, Article 37.071, Section 2. Moreover, while one may assume that jurors will speculate about parole eligibility, despite any instruction to the contrary (as the plurality in *Simmons* acknowledged, see 512 U.S., at 171, 114 S.Ct., at 2197), there may be a great deal of inconsistency in that speculation between juries in different cases, making assessment of the death penalty more arbitrary and inconsistent.

There is even more to say, in light of some other recent

decisions of the Court interpreting the Eighth Amendment. For a valid death-penalty process, as articulated in *Romano v. Oklahoma*, 512 U.S. 1, ___, 114 S.Ct. 2004, 2009, 129 L.Ed.2d 1 (1994):

> First, States must properly establish a threshold below which the penalty cannot be imposed. *McCleskey v. Kemp*, 481 U.S. 279, 305, 197 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987). To ensure that this threshold is met, the "State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *Ibid.* As we stated in *Lowenfeld v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Id.*, at 244, 108 S.Ct., at 554 (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983)). ...

Of particular concern is the requirement, recognized in *Romano*, that a statutory scheme must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." In order to "justify" the death penalty, the State of Texas should be required to show why some lesser punishment is inadequate. In other words, the State of Texas must shoulder the burden of proof on this question. The burden of proof is a sham in Texas, however, because the State aligns itself against the specter of a parolee running amok in the near future, even though this bogeyman does not really exist. In reality the petitioner would not have been at large for many years if sentenced to life in prison, and the life-imprisonment alternative would satisfy all but the most hardcore death-penalty

advocates among possible jurors.[9] With a correctly-informed jury sitting in judgment of the State's justification for execution, it would be much harder for the State to meet its burden under *Romano*. The question boils down to whether the Court meant what it said in *Romano* and in *Lowenfeld v. Phelps*. Presumably it did.

Finally, *Penry v. Lynaugh* [492 U.S. 302, 327, 109 S.Ct. 2934, 2951, 106 L.Ed.2d 256 (1989)] noted that approval of the Texas special-issue practice rested in part on assurances that the method would be applied broadly enough to incorporate relevant mitigating considerations. Yet the decisions of the Court of Criminal Appeals of Texas impede consideration of what may be the strongest mitigating factor of all, particularly for a capital-murder defendant who will be on up in years, like petitioner, before he ever becomes eligible for even parole consideration much less release. The special death-penalty questions cannot reasonably be divorced from the accompanying charge, at least not with any confidence as to how a jury actually deals with the issues. A requirement of correct information in the charge fits within Justice Souter's accurate characterization of the Eighth Amendment as "requir[ing] provision of 'accurate sentencing information [as] an indispensable prerequisite to a reasoned determination whether a defendant shall live or die[.]'" *Simmons*, 512 U.S., at 172, 114

[9]For what it is worth, a parolee is not simply "at large" and totally unsupervised -- or at least he is not supposed to be. Improving parole supervision seems a more reasonable alternative than despairing that such supervision will be ineffective and using that pessimistic view as a reason for executing people.

S.Ct., at 2198, quoting from *Gregg v. Georgia*, 428 U.S. 153, 190, 96 S.Ct. 2909, 2933, 49 L.Ed.2d 859 (1976)(opinion of Stewart, Powell and Stevens, JJ.).

Prayer

Wherefore, the petitioner prays that the Court grant his petition for writ of certiorari to the Court of Criminal Appeals of Texas and reverse the judgment of that court, or alternatively, that the Court vacate his sentence of death.

Respectfully submitted,

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Certificate of Service

I certify that, on March 5, 2001, I hand delivered three copies of the foregoing *Petition for Writ of Certiorari* (with attached *Motion for Leave to Proceed in Forma Pauperis*) to an employee of the office of counsel of record:

Mr. Edward Marty, Assistant
Criminal District Attorney
100 N. Broadway Av., Suite 403
Tyler, TX 75702
Telephone 903/535-0520

Kenneth Nash

Appendix

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO.73,112

ALLEN BRIDGERS, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM SMITH COUNTY

WOMACK, J., delivered the opinion of the Court in which PRICE and JOHNSON, JJ., concur.

The appellant was convicted of capital murder in April 1998 and sentenced to death. *See* Penal Code sec. 19.03; Code Crim. Proc. art. 37.071.[1] Appeal is automatic and direct to this Court. *See* Tex. Const. art. I, sec. 5; art. 37.071. The appellant raises eight points of error. We shall affirm.

I. Pre-trial Issues

In his **second, third, fourth, and fifth** points of error, the appellant argues that the trial court should have ruled that his confession was inadmissible under the United

[1] Unless otherwise indicated, all further references to articles are to the Texas Code of Criminal Procedure.

States Constitution and article 38.22. The following facts bearing upon these issues were elicited through testimony at the suppression hearing.

The appellant flew to Fort Lauderdale, Florida from the Dallas-Fort Worth airport on May 25, 1997. On May 28, Fort Lauderdale Police Department Detective Charles Morrow received information from Crime Stoppers on a possible suspect wanted for murder in Texas. Detective Morrow had no prior knowledge of the Texas murder and did not contact Texas authorities. Rather, he accompanied the individual who had provided the information to Crime Stoppers to the Holiday Park area of Fort Lauderdale. This confidential informant pointed out the appellant as the person who had told him he had murdered a woman in Texas.

Detective Morrow waited for additional detectives to arrive and then they entered the park and approached the appellant, who was lying in the grass. Detective Morrow testified that there were seven plainclothes officers in the vicinity but could not remember how many approached the appellant. Morrow testified that his badge, gun, and handcuffs were displayed and it was obvious that he was a police officer.

Upon approaching the appellant, Detective Morrow told him that he was conducting an investigation and asked the appellant if he would accompany him to the police station. At the suppression hearing, Detective Morrow testified that the appellant was "nervous, but cooperative" and agreed to go to the police station for questioning, saying "Okay. That's fine. Let's go." He also testified that if the appellant had refused

to go to the station, he would have been detained and questioned in the park. The appellant was handcuffed and transported to the station in an unmarked car.

When they arrived at the Fort Lauderdale police station, Detective Morrow obtained the appellant's driver's license which identified him as Allen Bridgers. Next, Detective Morrow took him to the interview room to meet with Detectives Jack King and Jack Gee. Detective Gee had obtained a fax of a warrant for the appellant's arrest dated May 27 from the Smith County Sheriff's Department. According to Detective Morrow's testimony, it was at this point that the appellant was under arrest.

When King and Gee entered the room, they introduced themselves to the appellant and Detective King warned the appellant from a card issued by the Fort Lauderdale Police Department. The card read as follows:

> You have the right to remain silent. Do you understand?
> Anything you say can and will be used against you in a court of law. Do you understand?
> You have the right to the presence of an attorney/lawyer prior to any questioning. Do you understand?
> If you cannot afford an attorney/lawyer, one will be appointed for you before any questioning if you so desire. Do you understand?

The appellant responded affirmatively to each question posed to him. He indicated that he was not sure whether he wanted an attorney or not. He did ask and was permitted to speak to his mother. After he received the warnings, the appellant was asked if he knew why he was there and responded that Texas thought he had killed

someone. Detective King asked, "Did you?" and the appellant said, "Yes, you've got the right guy."

After the appellant finished talking to his mother, the detectives activated the tape recorder and administered the warnings a second time. Then the appellant gave the confession at issue in which he admitted murdering Mary Amie and taking her purse, jewelry, and car. He requested two short stops and both requests were honored. Both Detectives King and Gee testified that the appellant did not appear to be under the influence of any substances nor did his mental capacity seem diminished in any way. They also denied threatening the appellant or promising him anything in return for his statement.

In his **second** point of error, the appellant urges that he was arrested in violation of the Fourth Amendment to the United States Constitution thereby rendering his confession and the evidence derived therefrom inadmissible as fruit of the poisonous tree. In support of this contention, the appellant argues that the tip from the confidential informant provided neither probable cause nor reasonable suspicion to detain him and that in fact the encounter in Holiday Park was a groundless arrest. Therefore, he argues, the confession and resulting evidence are tainted as products of an illegal arrest and the trial court erred when it refused to suppress them.

The test for whether a police-citizen encounter is a Fourth Amendment seizure is an objective one: a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person

would have believed that he was not free to leave. *See California v. Hodari D.*, 499 U.S. 621, 628 (1991); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The reasonable person standard presupposes an innocent person. *See Florida v. Bostick*, 501 U.S. 429, 438 (1991).

Several factors bear upon whether a reasonable person would have felt free to terminate the encounter and walk away. Among these factors are the threatening presence of several officers, the display of a weapon, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *See Mendenhall*, 446 U.S. at 554; *see also Terry v. Ohio*, 392 U.S. 1, 19 (1968). The officer's perception of whether the citizen was free to leave is relevant only when he communicates that perception to the citizen by word or deed. *Stansbury v. California*, 511 U.S. 318 (1994).

The trial court did not abuse its discretion by finding that the initial encounter in Holiday Park did not amount to a seizure under the Fourth Amendment. The United States Supreme Court has repeatedly emphasized the fact that the law does not prohibit officers from approaching citizens in public and asking for voluntary cooperation. *See Mendenhall*, 446 U.S. at 553; *Terry*, 392 U.S. at 34. In *Mendenhall*, the Court stated that "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Id.* at 554.

In the present case, the Florida detectives did not summon the appellant, command him, or surround him in uniform with their guns drawn. Furthermore, Detective Morrow testified that the appellant seemed coherent and able to voluntarily consent to go to the station. When asked if he would go to the station, the appellant said, "Okay. That's fine. Let's go." The appellant places weight on Detective Morrow's testimony that he would have detained the appellant in the park if he had refused to cooperate. This fact, however, is irrelevant insomuch as Detective Morrow failed to communicate it to the appellant. *See Stansbury*, 511 U.S. 318. In short, there is no evidence in the record that compels a finding that a reasonable person in the appellant's position would not have felt free to walk away and terminate the encounter.

The appellant also relies on the fact that he was handcuffed while being transported to the police station. Handcuffs are commonly understood to signify arrest, and a reasonable person in the appellant's position might have felt "seized" at this time. However, the handcuffing of a defendant for the purpose of transporting him to a police station to continue an investigation does not necessarily implicate the Fourth Amendment. *See Rhodes v. State*, 945 S.W.2d 115, 117 (Tex. Cr. App. 1997). Handcuffing is just one of the factors in the analysis of whether a reasonable person in the appellant's position would have felt free to leave. *See Rhodes*, 945 S.W.2d at 118. Furthermore, this Court affords almost total deference to a trial court's rulings on application of law to fact questions if the resolution of those questions turns on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex.

Cr. App. 1997). The question whether a reasonable person in the appellant's position would have felt free to leave involves the application of legal standards to the unique facts of the case and turns on the trial judge's evaluation of the credibility and demeanor of the witnesses who testify at the suppression hearing. The record supports the trial court's finding that the appellant voluntarily accompanied the officers and was not seized until after the Florida detectives obtained the Texas warrant, and we will defer to it.

Having found that appellant was not seized within the meaning of the Fourth Amendment, we can say that he was not *illegally* seized. Thus, it is unnecessary to inquire whether the detectives had either probable cause or reasonable suspicion to detain him. The trial court did not err in finding that his statement was not the product of an illegal detention. **We overrule the appellant's second point of error**.

In the appellant's **third** point of error, he challenges the trial court's admission of his confession and the evidence derived therefrom under the Fifth Amendment of the United States Constitution. The appellant claims that the Florida detectives' failure to advise him of his right to an attorney *during* questioning violated the Fifth Amendment and made his confession and other evidence inadmissible.

The United States Supreme Court has determined that "prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). That these warnings are constitutionally required in order to protect a criminal

suspect's Fifth-Amendment privilege against self-incrimination was recently confirmed in *Dickerson v. United States*, 530 U.S. __, 120 S. Ct. 2326 (2000). The courts have long recognized that custodial interrogation places the privilege in jeopardy and presents a high risk that any response will be involuntary. The State does not deny, and so we will assume, that the appellant gave his confession in response to custodial interrogation.

Ft. Lauderdale Detectives King and Gee read the appellant his rights from a "*Miranda* card." The card stated, in relevant part, that "you have the right to the presence of an attorney/lawyer prior to any questioning." The appellant argues that this warning suggested that he had the right to consult an attorney only *before* questioning and that the attorney could not be present *during* questioning.

Certainly, the right to the presence of an attorney during questioning is a crucial vehicle for safeguarding the privilege against self-incrimination. *See Miranda*, 384 U.S. at 470. However, we do not think that the above warning is susceptible to the interpretation the appellant advances. The detectives did not tell the appellant that he had the right to consult or speak to an attorney before questioning, which might have created the impression that the attorney could not be present during interrogation. They told him that he had the right to the *presence* of an attorney before any questioning commenced. We think that this conveyed to the appellant that he was entitled to the presence of an attorney before questioning and that this attorney could remain during questioning.

The United States Supreme Court has stated on more than one occasion that no "talismanic incantation" is required as long as the warnings convey to the suspect the

substance of his Fifth-Amendment rights. *See Duckworth v. Eagan*, 492 U.S. 195, 202, (1989); *California v. Prysock*, 453 U.S. 355, 359-60 (1981). Similarly, the federal courts which have addressed this issue tend to focus on the defendants' likely understanding of the warnings:

> Without any chronological trend either toward or away from requiring express reference to the right to have an attorney present during interrogation, federal courts in the various circuits appear to have based their decisions on the particular circumstances of the case involved, often examining what the defendant probably understood from the totality and context of the warnings given.

Martin J. McMahon, Annotation, *Necessity that Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation*, 77 A.L.R. Fed. 123 (1999).

Because the Fifth-Amendment right to counsel is designed to protect suspects from giving coerced confessions in response to custodial interrogation, the crucial inquiry is whether the reference to the right to appointed counsel was linked with some future point in time after the police interrogation. *See California v. Prysock*, 453 U.S. at 360. The warnings administered to the appellant did not suggest that he could have an attorney only after questioning; they fully conveyed his right to the presence of an attorney before and during questioning, and his statement was not inadmissible under *Miranda*. The appellant does not challenge the voluntariness of his confession on any other ground, and so we hold that the trial court did not violate his Fifth-Amendment

rights by refusing to suppress that confession and the evidence derived therefrom. **The appellant's third point of error is overruled**.

In his **fourth** point of error, the appellant complains that he was interrogated after he affirmatively invoked his Fifth-Amendment right to counsel and that the trial court erred in denying his motion to suppress his statement and the evidence derived therefrom. The trial court found that the appellant voluntarily, freely, and intelligently waived his rights and never affirmatively or impliedly invoked his right to counsel.

The first time that Detectives Gee and King administered the warnings to the appellant, he said that he was not sure whether he wanted an attorney and that he wanted first to talk to his mother. After allowing the appellant to call and speak with his mother, the detectives again administered the warnings and asked, "Do you understand?" after each warning. The appellant replied "yes" to each question, indicating that he understood that he had the right to have an attorney present before the interrogation.

Under *Edwards v. Arizona*, 451 U.S. 477 (1981), as soon as a suspect invokes his Fifth-Amendment right to counsel, all interrogation must cease until he is provided with an attorney. We must determine whether the appellant's initial expression of uncertainty regarding an attorney constituted an invocation of his right to counsel and whether he subsequently waived that right to counsel by answering "yes" after the second set of warnings and giving the statement without the presence of counsel.

The appellant contends that his statement that he was not sure whether he wanted to talk to an attorney was an affirmative invocation of his right to counsel. But this

contention is refuted by *United States v. Davis*, 512 U.S. 452 (1994). In *Davis*, the Court stated that "...if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Davis*, 512 U.S. at 459 (emphasis in original). In that case, the trial court had held that the defendant's remark-- "maybe I should talk to a lawyer"-- was not a request for counsel, and the Supreme Court did not disturb this finding. *Id.* at 463. In the present case, the appellant's statement regarding counsel was more equivocal than was the defendant's statement in *Davis*. We cannot say that the appellant's remark was an unambiguous invocation of his right to counsel that was violated by continued interrogation.

We still must determine, however, whether the appellant waived his Fifth-Amendment right to counsel. The appellant argues that the trial court should have kept his statement out of evidence because he never explicitly stated that he did not want an attorney. An explicit statement of waiver, however, is not invariably necessary to support a finding that the defendant waived the right to counsel. *See North Carolina v. Butler*, 441 U.S. 369, 376-77 (1979). Waiver may be implied by the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver. *See Butler*, 441 U.S. at 373.

Here, the appellant was not silent; he indicated that he understood his rights by saying "yes," and then he proceeded to make inculpatory statements without an attorney

present. Both Detectives Gee and King testified that the appellant did not appear to be under the influence of drugs or have diminished capacity. He had a chance to talk to his mother before he made the statement. All of these circumstances support the trial court's finding that the appellant knowingly, voluntarily, and intelligently waived his right to counsel before making the audio-taped statement at issue.

Because the appellant did not invoke his right to counsel and because he did effectively waive that right, the trial court did not violate his Fifth-Amendment right to counsel by admitting his confession and the fruits of that confession into evidence. **The appellant's fourth point is overruled**.

The appellant next complains in his **fifth** point of error that the admission of his confession and evidence derived therefrom was improper because the warnings administered by the Fort Lauderdale detectives did not comply with those set forth in article 38.22, section 2(a).[2] Specifically, the warnings did not mention that the appellant had the right to terminate the interview at any time or that he had the right to counsel *during* the interview. The trial court found that the warnings given by the Florida police

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[2] This section provides that "no written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

(a) The accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement was made a warning that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

(2) any statement he makes may be used as evidence against him in court;

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview at any time

officers were the "fully effective equivalent of those requirements of 38.22."

Alternatively, the court found that the appellant's statement contained assertions of facts and circumstances that were found to be true upon further investigation by the police and that those facts and circumstances conduced to establish the guilt of the accused. Thus, the trial court found that the statement was admissible under article 38.22, section3(c).[3] A statement admitted under section 3(c) is expressly exempted from the statutorily required warnings of section 2(a). These statements need only comply with *Miranda* to be properly admissible. *See Perillo v. State*, 758 S.W.2d 567, 575 (Tex. Cr. App. 1988).

At the suppression hearing, the State argued and the trial court found that the warnings given by Detectives King and Gee complied with *Miranda*. *Miranda* does not require a warning that the defendant can terminate the interview at any time; that is a statutory right under article 38.22, section 2(a). *See Perillo*, 758 S.W.2d at 575. We concluded, in discussion of the appellant's third point of error, that the record supports the trial court's finding that the Fort Lauderdale detectives complied with *Miranda*.

Furthermore, the appellant's statement satisfies all of the requirements of section 3(c). At the suppression hearing, the testimony established that, before the appellant gave his statement, neither the Florida nor the Texas detectives knew where the appellant had left the victim's car or what he had done with her jewelry. The appellant described

[3] This section provides that the Article 38.22, section 2(a) requirements "shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed."

the area of Dallas in which he left the car and told the officers that he had pawned the victim's jewelry. Texas detectives found the car where the appellant had said it would be and found pawn slips for the jewelry with the appellant's name on them. This evidence tends to establish the appellant's guilt: it demonstrates that he had control over the victim's property and wanted to dispose of that property.

This Court has upheld the admission of a statement under section 3(c) where that statement led to the recovery of property stolen in the offense. *See Perillo*, 758 S.W.2d at 575. Here, the appellant's statement led to the recovery of the victim's car. Thus, the trial court did not err in admitting the appellant's statement into evidence despite the Florida detectives' failure to give the exact warnings mandated by section 2(a).

Accordingly, the appellant's fifth point of error is overruled.

II. Sentencing Issues

In his **first** point of error, the appellant contends that there is insufficient evidence to support the jury's finding that he would commit criminal acts of violence in the future which would constitute a continuing threat to society. The State argues that the facts of the case alone suffice to establish the appellant's dangerousness and, alternatively, that the evidence presented at the punishment hearing was enough to sustain the jury's affirmative finding.

When reviewing the sufficiency of the evidence of future dangerousness, this Court considers the circumstances of the offense as well as the evidence adduced at the punishment stage of the trial. *See, e.g. Keeton v. State*, 724 S.W.2d 58, 59 (Tex. Cr.

App. 1987). Viewing the evidence in the light most favorable to the verdict, we ask whether a rational jury could have concluded beyond a reasonable doubt that there is a probability that the appellant would commit criminal acts of violence constituting a continuing threat to society. *See, e.g. Chambers v. State*, 866 S.W.2d 9, 16 (Tex. Cr. App. 1993).[4]

The State presented evidence that the victim, Mary Amie, took the appellant into her home, began a sexual relationship with him, and planned to pay his tuition to truck driving school. The appellant, after learning that Ms. Amie obtained a loan to build a fence around her house, planned to kill her and take her money. According to his own confession, the appellant smoked crack cocaine and waited in the victim's bed for more than six hours with her gun under his pillow. When the victim returned from work, she took a shower and got into bed next to the appellant. The appellant then shot her three times, unplugged her phone, grabbed her purse, and left her dying. He spent the night with two women smoking crack at a motel in Tyler. Early the next morning, the

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[4] This Court may also employ a non-exclusive list of factors to assist in reviewing the sufficiency of the evidence to support the finding of future dangerousness, including:

1. The circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;
2. The calculated nature of the defendant's acts;
3. The forethought and deliberateness exhibited by the crime's execution;
4. The existence of a prior criminal record, and the severity of the prior crimes;
5. The defendant's age and personal circumstances at the time of the offense;
6. Whether the defendant was acting under duress or domination of another at the time of the offense;
7. Psychiatric evidence; and
8. Character evidence.

Keeton v. State, 724 S.W.2d 58, 61 (Tex. Cr. App. 1987).

appellant drove the victim's car to Dallas and pawned her jewelry. From there, the appellant flew to Ft. Lauderdale where he was arrested within a few days.

At the punishment phase, the State introduced evidence of the appellant's prior convictions. Through police officers and probation officers, the State elicited that the appellant had been convicted of burglary, theft, financial transaction card fraud, reckless driving, attempt to elude a police officer, and carrying a concealed handgun. Several of his offenses occurred while he was on probation. The State introduced circumstantial evidence that the appellant had discharged a firearm near a school. Members of the appellant's family testified that he abused alcohol from the age of twelve or thirteen, smoked marijuana, "huffed" paint, and smoked crack cocaine from the age of eighteen. The State also presented victim-impact testimony through the victim's family members. And, through cross-examination of defense expert witness and clinical psychiatrist Dr. Quijano, the State established that a person with characteristics similar to the appellant's- an escalating pattern of substance abuse and criminal activity– would be likely to present a danger to society in the future.

The appellant compares his case to a line of cases in which this Court has found insufficient evidence of future dangerousness. He argues that this was an ordinary murder in the course of robbery and, as such, is indistinguishable from the class of robbery-murder cases deserving of a life sentence. The appellant relies upon *Roney v. State*, 632 S.W.2d 598 (Tex. Cr. App. 1982), and so we will compare his case with the facts in *Roney*.

In *Roney*, the State relied almost entirely upon the circumstances of the offense to show future dangerousness. Though accompanied by two other men, the seventeen-year-old defendant fired the fatal shot in a robbery of a convenience store clerk. *Roney*, 632 S.W.2d at 602. The State presented no evidence of a prior criminal record, psychiatric evidence, or character evidence. We stated that "[t]o hold that the facts of this offense, standing alone, would support such a verdict, would mean that virtually every murder in the course of a robbery would warrant the death penalty." *Roney*, 632 S.W.2d at 603. And in *Roney*, the jury's finding of future dangerousness could not have been based on anything other than the circumstances of the offense.

While the facts in *Roney* may reflect a typical murder in the course of robbery, the facts in the present case do not. Here the appellant acted alone. He lay in wait for his victim, a woman who went out of her way to help him. He shot her in the back and then fired again. He unplugged her phone so that she could not call for help, took her purse, and left in her car. Then, he spent the night smoking crack. This type of murder in the course of robbery is quite different from the convenience-store robbery-murder in *Roney*.

The State, however, presented more than the circumstances of the offense. The jury heard about the appellant's prior convictions and other crimes. During several of the offenses, the appellant carried a gun. His record revealed a steady progression toward more and more serious criminal acts, which his own expert witness identified as predictive of future dangerousness.

We hold that, considering all of the State's evidence and viewed in the light most favorable to the verdict, a rational jury could have found the elements of future dangerousness beyond a reasonable doubt. **The appellant's first point of error is overruled**.

The appellant raises several federal constitutional challenges to the Texas capital-sentencing scheme in points of error **six, seven, and eight**. Because this Court has previously considered and rejected each such challenge, we will discuss the points only briefly.

In his **sixth and seventh** points of error, the appellant claims that the trial court's refusal to instruct the jury about the forty-year minimum incarceration period violated the Fourteenth and Eighth Amendments to the United States Constitution. The appellant relies primarily upon *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding that a defendant's Fourteenth Amendment due process rights were violated by the trial court's refusal to instruct the jury that he would never be released on parole if sentenced to life imprisonment for capital murder).

The *Simmons* decision was grounded on the premise that, if future dangerousness was a basis for the imposition of a death sentence and state law prohibits parole for persons sentenced to death, then the defendant should have an opportunity to inform the sentencing jury that he is parole ineligible. The issue of a parole instruction in capital cases was presented to this Court in *Smith v. State*, 898 S.W.2d 838 (Tex. Cr. App. 1995). There, the appellant argued that the *Simmons* rule should apply in Texas and that

the jury should have been informed that he would have to serve thirty-five calendar years if he was sentenced to life imprisonment instead of to the death penalty. *Smith*, 898 S.W.2d at 848. A plurality of this Court engaged in a comprehensive discussion of *Simmons* as it relates to the law in Texas. The plurality reiterated that parole is traditionally not a matter for jury consideration in a Texas capital murder trial; thus, it is not error for a trial court to refuse to admit testimony concerning parole. *See e.g. Jones v. State*, 843 S.W.2d 487, 495 (Tex. Cr. App. 1992). Six judges rejected the contention that *Simmons* has been extended to parole eligible defendants. *Smith*, 898 S.W.2d at 848.

Furthermore, a plurality of the United States Supreme Court recently confirmed that a *Simmons* parole-ineligibility instruction is required only when, assuming the jury fixes a life sentence, the defendant is ineligible for parole under state law. *Ramdass v. Angelone*, 530 U.S. __, 120 S. Ct. 2113 (2000). Otherwise, the plurality reiterated, due process does not mandate an instruction. *Ramdass*, 120 S. Ct. at 2120-21. Under Texas law, a defendant who is convicted of capital murder and sentenced to life imprisonment becomes eligible for parole after he has served forty calendar years.[5]

Because *Smith* and *Ramdass* make it clear that neither the Eighth nor the Fourteenth Amendment requires an instruction on parole unless the defendant is legally

[5] In 1999, the Texas Legislature amended the statute to provide that a judge shall, upon the written request of defense counsel, give the jury an instruction on the parole eligibility of a defendant sentenced to life imprisonment for capital murder. The statute does not apply to the trial of an offense, like the appellant's, that was committed before its effective date.

ineligible for parole, the trial court did not err in refusing the appellant's requested instruction. **His sixth and seventh points of error are overruled**.

In his **eighth** point of error, the appellant claims that article 37.071, section 2(a)[6], the prohibition against informing the jury that a hung jury will result in a life sentence, violates the Eighth and Fourteenth Amendments to the United States Constitution.

In the instant case, the trial court charged the jury that a life sentence would be imposed if ten or more jurors answered "no" to the future dangerousness issue and "yes" to the mitigation issue. The appellant's attack is that the jury was not told that it could select neither of these options and remain deadlocked. Accordingly, the appellant contends, there is a reasonable likelihood that the jury interpreted the instructions to mean that a lack of unanimity would result in a mistrial. He claims that giving jurors inaccurate information about sentencing matters violates the Eighth Amendment, and he compares his case to *Caldwell v. Mississippi*, 472 U.S.320 (1985), in which the United States Supreme Court held that a prosecutor may not mislead the jury into thinking that the responsibility for imposing the death penalty lay not with the jury but with the appellate courts who review the case. *Id.* at 341. This Court has already considered the "10-12" rule in the context of *Caldwell* : "One of the underlying values of the *Caldwell* decision is to ensure the proper level of juror deliberation. The "10-12" rule serves this

[6] Article 37.071 sec. 2(a) provides in relevant part that "[t]he court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure to agree on issues submitted under Subsection (c) or (e) of this article."

value by not giving the jury the consequences of a nonverdict, while at the same time it ensures that the death penalty will not be imposed without the unanimous consent of the jury." *Prystash v. State*, 3 S.W.3d 522, 537; *accord Davis v. State*, 782 S.W.2d 211, 221-22 (Tex. Cr. App. 1989), *cert. denied*, 495 U.S. 940 (1990).

Though they have been the subject of frequent attack, the instructions in article 37.071, sections 2(d) and 2(f), known as the "10-12" rule, have been consistently upheld as constitutional. *See Prystash*, 3 S.W.3d at 536-37 (Tex. Cr. App. 1999) (upholding the constitutionality of the "10-12" rule); *Lawton v. State*, 913 S.W.2d 542, 558-59 (Tex. Cr. App. 1995) (upholding the constitutionality of concealing the consequences of a hung jury).

Furthermore, the United States Supreme Court recently rejected an Eighth-Amendment challenge to a federal district court's failure to instruct the jury as to the effect of their inability to agree on aggravating and mitigating factors under the Federal Death Penalty Act, 18 U.S.C. sections 3591(a), 3592, and 3593(e). *See Jones v. United States*, 527 U.S. 373 (1999). Justice Thomas, writing for the majority, stated that the argument that a death sentence is arbitrary within the meaning of the Eighth Amendment if the jury is not given any bit of information that might possibly influence an individual juror's voting behavior is without merit. *Jones*, 527 U.S. at 382.

The case law in this area is well settled. We conclude that the Texas statute under which the court is prohibited from instructing the jury on the consequence of deadlock

does not violate the Eighth and Fourteenth Amendments to the United States Constitution. **Accordingly, the appellant's eighth point of error is overruled.**

The judgment of the trial court is affirmed.

En Banc.
Do Not Publish.
Delivered October 25, 2000.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

December 6, 2000
114TH DISTRICT COURT-114-81252-97
RE: Case No. 73,112
STYLE: BRIDGERS, ALLEN

On this day the Appellant's Motion for Rehearing was denied.

KENNETH NASH
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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 14, 2001

Clerk
Court of Criminal Appeals of Texas
P.O. Box 12308
Capitol Station
Austin, TX 78711

Re: Allen Bridgers
v. Texas
No. 00-8942
(Your No. 73,112)

Dear Clerk:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Statement of Justice Breyer, with whom Justice Stevens and Justice Souter join, respecting the denial of the petition for a writ of certiorari.

Sincerely,

William K. Suter, Clerk